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No. 02-1529

In the Supreme Court of the United States

RUBEN GOMEZ-CHAVEZ, PETITIONER

v.

DEBORAH ACHIM, INTERIM FIELD OFFICE DIRECTOR FOR DETENTION AND REMOVAL, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, AND JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in considering petitioner's constitutional challenge to the reinstatement of an order of removal from the United States in the context of petitioner's petition for review of the reinstatement order, without also addressing the same claim in the context of petitioner's appeal from the district court's dismissal of petitioner's complaint challenging the reinstatement order.

2. Whether the reinstatement, under 8 U.S.C. 1231(a)(5), of an earlier order of removal from the United States that had been entered against petitioner denied petitioner due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 308 F.3d 796. The order of the district court dismissing petitioner's complaint (Pet. App. 21a) is unreported. The decision of the Immigration and Naturalization Service reinstating petitioner's removal order (Pet. App. 16a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002. A petition for rehearing was denied on December 11, 2002 (Pet. App. 22a). The petition for a writ of certiorari was filed on March 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has established procedures to expedite the removal from the United States of aliens who reenter the country unlawfully after previously being removed. The Immigration and Nationality Act, 8 U.S.C. 1231(a)(5), provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Because Congress specified that the alien's original order of removal "is not subject to being reopened or reviewed" and the alien is not eligible for relief from removal, the administrative regulations that implement Section 1231(a)(5) provide that aliens subject to reinstatement have no right to a hearing before an immigration judge. 8 C.F.R. 241.8(a); see 62 Fed. Reg. 10,326 (1997). However, an earlier removal order will be reinstated only after an immigration officer establishes the identity of the alien, that the alien is subject to a prior order of removal, that he was removed or

departed voluntarily while under the prior order, and that the alien reentered the United States unlawfully. 8 C.F.R. 241.8(a). The alien is given notice of the immigration officer's determinations and an opportunity to seek reconsideration by the officer. 8 C.F.R. 241.8(b). Aliens who allege that they will be persecuted or tortured if returned to their country of removal are provided an opportunity to seek protection from removal on those grounds. 8 C.F.R. 241.8(e).

b. Just as Congress established the reinstatement procedure to allow swift removal of aliens who clearly lack a right to reenter the United States, it established an expedited procedure to allow swift removal of aliens who clearly lack a right to enter the United States in the first place. Under 8 U.S.C. 1225(b)(1), an immigration officer who determines that an arriving alien is inadmissible to the United States due to immigration fraud or the absence of valid immigration documents "shall order the alien removed from the United States without further hearing or review." 8 U.S.C. 1225(b)(1)(A)(i). The expedited removal procedure does not apply to asylum-seekers or persons who claim to be citizens or lawful permanent residents of the United States, or to have been granted asylum. 8 U.S.C. 1225(b)(1)(A) and (C); 8 C.F.R. 235.3(b)(4) and (5).

Before ordering an alien removed from the United States under the expedited removal provision, the immigration officer must create a record of the facts of the case and the alien's statements. The alien may correct the record of his statements. Interpretive assistance is used if necessary to communicate with the alien. 8 C.F.R. 235.3(b)(2)(i). Each expedited removal order prepared by an immigration officer must be

reviewed and approved by a supervisor before it becomes final. 8 C.F.R. 235.3(b)(7).[1]

2. Petitioner is a national of Mexico. In January 1999, he was stopped at the border when he attempted to enter the United States by presenting a fraudulent United States passport. Pet. App. 2a, 19a. The Immigration and Naturalization Service (INS) removed petitioner to Mexico after conducting an expedited removal proceeding under 8 U.S.C. 1225(b)(1). Pet. App. 2a-3a. The INS determined that petitioner was inadmissible to the United States for falsely claiming United States citizenship when seeking admission. *Id.* at 19a-20a; see 8 U.S.C. 1182(a)(6)(C)(ii). Petitioner admitted the relevant facts establishing his removability, including his use of a fraudulent passport. Pet. App. 2a. Petitioner was barred for a period of five years from reentering the United States without the Attorney General's permission, and warned that he would be subject to prosecution if he reentered without permission. *Id.* at 2a, 3a; see 8 U.S.C. 1326(a).

3. Within a month of his removal, petitioner crossed the Mexican border and reentered the United States unlawfully and without inspection. Pet. App. 3a, 16a. In March 1999, he married a United States citizen. *Id.* at 3a. Petitioner and his wife then filed applications

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[1] The exclusive mechanism for obtaining judicial review of individual removal orders entered under the expedited procedure of Section 1225(b)(1) is a habeas corpus proceeding. See 8 U.S.C. 1252(a)(2)(A) and (e). In such a proceeding, the court's review is limited to determining whether the individual seeking relief is an alien, whether the alien was ordered removed under Section 1225(b)(1), and whether the alien can prove by a preponderance of the evidence that he was previously admitted to the United States as a lawful permanent resident or refugee, or granted asylum. 8 U.S.C. 1252(e)(2) and (5).

with the INS that, if granted, would have allowed petitioner to become a lawful permanent resident of the United States based on his marriage. *Ibid.*

In the course of processing the applications, the INS discovered that petitioner had reentered the United States illegally after his prior removal. Pet. App. 3a. In July 2001, the INS reinstated petitioner's 1999 order of removal pursuant to 8 U.S.C. 1231(a)(5). Pet. App. 3a-4a, 16a-18a. Petitioner was released from INS custody pending his scheduled removal to Mexico. *Id.* at 4a.

4. While his removal to Mexico was still pending, petitioner petitioned the INS for permission to apply for admission to the United States after his removal. Pet. App. 4a. Petitioner also filed a complaint for a writ of mandamus and a declaratory judgment in the Northern District of Illinois. In his complaint, petitioner challenged the INS's reinstatement of his 1999 removal order and sought an injunction against his removal to Mexico. Pet. 6; Pet. App. 2a, 4a. On August 8, 2001, the district court dismissed the complaint for lack of jurisdiction, after determining that challenges to removal orders must be brought in the proper court of appeals upon a timely petition for review. Pet. App. 4a, 21a; see 8 U.S.C. 1252(b).

Petitioner then filed a petition for review of the reinstatement order in the United States Court of Appeals for the Seventh Circuit. Pet. App. 4a. On August 9, 2001, the court of appeals dismissed the petition for review because it determined that petitioner sought to challenge the Attorney General's decision to execute a removal order, and, under 8 U.S.C. 1252(g), courts lack jurisdiction to hear such challenges. Pet. App. 4a.

Petitioner then moved in the district court for reconsideration of the August 8, 2001, order of dis-

missal, and for leave to file an amended complaint adding a habeas corpus claim. On August 21, 2001, the district court denied the motion for reconsideration of the August 8 dismissal. On September 7, 2001, the district court denied petitioner's motion for leave to file an amended complaint. Pet. App. 4a-5a.

5. Petitioner appealed the district court's orders, and the court of appeals stayed petitioner's removal pending the appeal. Pet. App. 5a.[2]

In its decision, the court of appeals first determined that the district court "was clearly correct" when it dismissed petitioner's complaint and denied him leave to add a habeas corpus claim. Pet. App. 5a. The court explained that (as the district court had concluded) the statutorily authorized mechanism for obtaining review of the INS's reinstatement order is a petition for review in the court of appeals. *Ibid.*

Furthermore, the court of appeals determined that it had erred in summarily dismissing petitioner's earlier petition for review without "an examination of the arguments [petitioner] was making to see if [petitioner]

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[2] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement (ICE). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). Before the reorganization, an INS official and the INS were named as the defendant/appellee in the proceeding instituted in the district court and the respondent to the petition for review, respectively, see Pet. App. 1a, 21a, and as the respondents in this Court. The correct, substituted respondents in this Court after the reorganization are the ICE Interim Field Office Director for Detention and Removal in the appeal from the district court proceeding, and the Attorney General of the United States in the petition-for-review proceeding, see 8 U.S.C. 1252(b)(3)(A).

was really challenging only the removal order, or if his appeal raised issues not covered by § 1252(g)." Pet. App. 5a. The court therefore recalled its mandate dismissing the petition for review of the INS's reinstatement order and reopened that proceeding, while affirming the district court's judgment. *Id.* at 5a, 11a-13a.

In the petition-for-review proceeding, the court of appeals concluded that petitioner is not entitled to judicial relief. Pet. App. 6a-10a. The court explained that petitioner's "primary claim" was that the INS was improperly refusing to adjudicate his application for permission to apply for admission to the United States after his removal. *Id.* at 6a. It concluded that petitioner's claim is barred by 8 U.S.C. 1252(g) because Section 1252(g), which expressly bars judicial review of claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," 8 U.S.C. 1252(g), "appl[ies] not only to the Attorney General's positive actions, but also to his refusals to take action." Pet. App. 6a. The court added that the INS was not required to "reward[] [petitioner] for his illegal reentry" by considering his application for a discretionary immigration benefit before removing petitioner from the United States. *Id.* at 10a. The court also observed that, after petitioner is removed, he may apply for discretionary relief allowing him to reenter the United States lawfully. *Id.* at 10a-11a.

The court of appeals likewise rejected petitioner's claim that his removal under the reinstatement procedures of 8 U.S.C. 1231(a)(5) and 8 C.F.R. 241.8 violates the due process guarantee of the Fifth Amendment. The court agreed with petitioner that, as an alien who accomplished an unlawful entry into the United

States, petitioner can claim some measure of due process protection. Pet. App. 7a-8a. But the court recognized a "compelling" governmental interest "in the efficient and evenhanded administration" of the immigration laws. *Id.* at 8a. Furthermore, the court emphasized that its review was limited to the 2001 reinstatement of petitioner's 1999 removal order, and that the court could not "look behind that [2001] order to the underlying [1999] removal order." *Ibid.* (citing *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002)).

The court observed that petitioner does not dispute any of the facts relevant to the reinstatement of his removal order. Pet. App. 8a-9a. And it explained that when there is a dispute about whether the requirements for reinstating a removal order are satisfied, the immigration officer's determination is subject to judicial review. *Id.* at 9a-10a; see *id.* at 6a-7a. Thus, the court found no due process violation in the fact that petitioner was ordered removed without a hearing before an immigration judge or Article III judge. *Id.* at 9a. The court noted that this case does not present the question of what judicial fact-finding procedures should be followed when a removal order is reinstated based on findings of fact that are disputed in a petition for judicial review, because "there are simply no disputed facts that could make a difference" in petitioner's case. *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is not warranted.

1. Petitioner first argues (Pet. 8-10) that the court of appeals erred in affirming the district court's dismissal

of his complaint seeking a writ of mandamus and a declaratory judgment. Petitioner contends that, in affirming the district court, the court of appeals "ignored" his claim that 8 U.S.C. 1231(a)(5) is unconstitutional. Pet. 9. Petitioner's argument that the court of appeals in this case failed to address one of his contentions raises no issue of general importance that would warrant this Court's review. In any event, the court of appeals did consider and reject, in the context of the petition for review proceeding, petitioner's claim that Section 1231(a)(5) is unconstitutional. See Pet. App. 7a-10a. The court of appeals' alleged error consisted of nothing more than reviewing petitioner's claim under the rubric of his petition for review, rather than his appeal from the dismissal of his district court complaint. That procedural distinction had no apparent bearing on the court of appeals' rejection of the merits of petitioner's constitutional argument.

Petitioner further argues (Pet. 10-11) that the district court would have had jurisdiction to hear the habeas corpus claim that petitioner sought to add *after* the dismissal of his district court complaint. That argument, however, does not suggest that the district court abused its discretion by refusing to allow petitioner to make a post-judgment amendment to his complaint. And as explained above, the court of appeals *did* consider on the merits, in the petition for review proceeding, the constitutional argument that petitioner sought to present in the district court.

2. Petitioner asserts (Pet. 16-20) that the court of appeals erred when it determined that the INS's reinstatement of petitioner's removal order, without a more elaborate adjudication, did not deny him due process. He also suggests that the Seventh Circuit's resolution

of that constitutional question conflicts with decisions of the Ninth Circuit. Those contentions lack merit.

a. Petitioner does not explain how he suffered injury from the application of Section 1231(a)(5), as implemented by the INS, in his case. Petitioner does not suggest that a hearing before a judge would have resulted in a different outcome in his reinstatement proceeding, and he does not challenge the provision of Section 1231(a)(5) that renders him ineligible for discretionary relief from removal.[3] The only issue in an adjudicatory hearing would have been petitioner's removability, which in this case was established by facts that were undisputed both at the time the removal order was originally entered, and when the order was reinstated. See Pet. App. 2a, 9a, 10a. Because a hearing could not possibly make a difference in petitioner's case, he lacks standing to raise the claim that due process requires a hearing. See *Allen* v. *Wright*, 468 U.S. 737, 751 (1984) (to have Article III standing, plaintiff must allege "personal injury fairly traceable to" the alleged violation "and likely to be redressed by the requested relief").

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[3] In any event, petitioner has no constitutionally protected interest in obtaining discretionary relief from removal. Even when a statutory provision makes an alien eligible to be considered for discretionary relief, a grant of such relief is "not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Such relief is accorded pursuant to the Attorney General's "unfettered discretion," and is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (internal quotation marks omitted). Cf. *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983) (prisoners lack constitutionally protected liberty interest in discretionary prison assignments).

Relatedly, petitioner offers no explanation of what procedural benefit a full-blown adjudicatory hearing would have provided in his case, in which the relevant facts were undisputed. Nor does petitioner show that any possible benefits from more elaborate procedures in either the initial adjudication of his removability or the reinstatement of his 1999 removal order would outweigh the government's strong interest in the timely removal of aliens who attempt to enter, or succeed in entering, the United States illegally. See generally *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (power to exclude or expel aliens is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

b. Contrary to petitioner's suggestion (Pet. 18-20), there is no direct conflict between the Seventh Circuit's decision in this case and Ninth Circuit decisions addressing the constitutionality of Section 1231(a)(5), as implemented by 8 C.F.R. 241.8. In *Castro-Cortez* v. *INS*, 239 F.3d 1037 (2001), on which petitioner principally relies, a Ninth Circuit panel expressed "serious doubt whether the use of Immigration Officers to determine whether to reinstate removal orders comports with due process." *Id.* at 1049. As petitioner recognizes (Pet. 19), however, that discussion was dictum, because the panel determined that Section 1231(a)(5) was not applicable in that case. See 239 F.3d at 1050.

Subsequently, in *Alvarenga-Villalobos* v. *Ashcroft*, 271 F.3d 1169 (2001), the Ninth Circuit *upheld* the reinstatement procedures of 8 C.F.R. 241.8 against a due process challenge, relying principally on the fact that the alien in that case had a "full and fair hearing" prior to the entry of the removal order that was reinstated.

271 F.3d at 1174 (emphasis deleted). The *Alvarenga-Villalobos* court expressly noted that *Castro-Cortez* did not decide the constitutionality of the INS's reinstatement procedures, *ibid.*, and that court did not address the constitutionality of Section 1231(a)(5) and the INS's implementing procedures in a situation such as this one, in which the underlying removal order was entered using the expedited removal procedures of 8 U.S.C. 1225(b)(1).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] In this case, petitioner admitted the facts supporting his 1999 removal order. Pet. App. 2a. Therefore, the absence of a removal hearing in 1999 would not appear to constitute a relevant distinction between petitioner's case and *Alvarenga-Villalobos*, which rejected the alien's due process challenge. It is clear, however, that the Ninth Circuit has not ruled on a due process challenge like petitioner's.